

June 14 2010

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

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FILED

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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 10-0101

CHARLES LOKEY,)	Cause No. DV-08-57B
and VANESSA LOKEY,)	Hon. Wm. Nels Swandal
)	
Plaintiffs,)	
)	
v.)	APPELLEE A.M. WELLES, INC.'S
)	BRIEF IN OPPOSITION TO
)	APPELLANTS' MOTION TO
ANDREW J. BREUNER,)	RECONSIDER DECISION RE:
and A.M. WELLES, INC.,)	ISSUES ON APPEAL
)	
Defendants.)	

Charles and Vanessa Lokeys' ("Lokeys") claims arise out of a September 7, 2006 accident when bicyclist Charles Lokey ran into motorist Andrew Breuner ("Breuner"), who was making a left turn. Lokeys allege a driver for Welles was

negligent in making a courtesy stop and signaling to Breuner that he could proceed without determining whether the turn might create a hazard for Charles Lokey.

On February 6, 2009, the District Court dismissed Welles from the case finding that the Welles driver did not owe a duty to Charles Lokey. [CR 40] On June 9, 2009, the District Court entered an Order denying both remaining parties' motions for summary judgment and discussing Charles Lokey's violation of § 61-8-324, MCA. [CR 62] Almost one year after the District Court entered its Order dismissing Welles from the case, Lokeys moved for 54(b), M.R.Civ.P Certification solely on the issue of Welles' dismissal. [CR 72] The District Court granted Certification.

This Court allowed the appeal "to proceed *only* with respect to the matter certified to us, which is the order of dismissal of Plaintiffs' claims against Welles. We will not review the District Court's June 9, 2009 order." (emphasis in original). Notwithstanding this Court's explicit directive, Lokeys now ask this Court to review an order which is prohibited by both the Montana Rules of Appellate Procedure ("Rules") and case law.

Review of a determination or ruling that is not a "final judgment" pursuant to Rule 54(a), M.R.Civ.P. and which the District Court has not certified as final under 54(b), M.R.Civ.P. is not permitted under the Rules. For example, in *Losleben v.*

Oppedahl the district court granted 54(b) Certification of its summary judgment order granting qualified immunity to one of the defendants in plaintiff's 42 U.S.C. § 1983 action. 2004 MT 5, ¶ 10, 319 Mont. 269, 83 P.3d 1271. In addition to the above order, the parties sought review of the denial of plaintiff's motion for partial summary judgment (that plaintiff did not violate a suspect's constitutional rights). *Losleben* at ¶ 4. This Court refused to address the second issue because it was not a final judgment pursuant to Rule 54(a), M.R.Civ.P. and had not been certified pursuant to Rule 54(b), M.R.Civ.P. by the district court. *Losleben* at ¶ 26. This Court explained that it could not review the second issue on the merits. *Losleben* at ¶ 26.

Like the parties in *Losleben*, Lokeys have asked this Court to review an issue which is not a final judgment and which has not been certified as final pursuant to Rule 54(b), M.R.Civ.P. Lokeys' Motion for Rule 54(b) Certification is devoid of any mention of Breuner's liability except to distinguish it from Welles' duty. Like the *Losleben* court, this Court does not have jurisdiction to review the District Court's June 9, 2009 Order.

In their Motion for Reconsideration Re: Issues on Appeal, Lokeys posit that the June 9, 2009 Order "*may* not be appealable pursuant to Rule 6(1) and (3), M.R.App.P." A review of Rule 6, M.R.App.P. demonstrates that it *does not allow* the

Lokeys' requested appeal; it provides in relevant part: "[u]pon appeal from a final judgment entered in an action or special proceeding in a district court, this court may review the judgment, as well as all *previous* orders and rulings excepted or objected to *which led to and resulted in the judgment*. Rule 6(1), M.R.App.P. (emphasis added). It is axiomatic that an order which came after the order certified as final pursuant to 54(b), M.R.Civ.P. is not an order which "led to and resulted in the judgment."

Furthermore, prior to the Lokeys' Motion for Reconsideration Re: Issues on Appeal, the Lokeys themselves argued that the issue of whether Welles had a duty to Lokeys and whether Bruener exercised reasonable care in turning are discrete. In their Motion for Rule 54(b) Certification the Lokeys termed the claims as "legally distinct" and reasoned that the District Court's dismissal of the claims against Welles was "based on a conclusion of law that is entirely unrelated to, and severable from, the claims against Breuner." [CR 72, p. 6] In its Motion for Reconsideration Lokeys now argue that the Court's June 9, 2009 Order regarding Breuner's liability "relates back" to Welles liability. This assertion is contrary to the distinctions Lokeys made in their 54(b) Motion and militates against Rule 54(b) Certification in the first place.

The Lokeys provide no authority for their position that this Court should ignore its own Rules, instead they reason that “[s]ince this Court is going to address Welles’ dismissal, there is no reason, aside from a rule this Court adopted and is free to interpret or modify to secure the just, speedy and inexpensive resolution of cases, to make the Lokeys await the outcome of this appeal and then file a petition for supervisory control.” Appellants’ Motion to Reconsider Decision Re: Issues on Appeal, at p. 5.

The Lokeys fail to consider the myriad reasons why this Court should not “modify” its Rules. Welles adopts the reasons cited in Breuner’s Response Brief discussing why this Court should not “modify” its Rules.

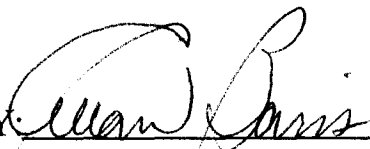
Not only do Lokeys seek to modify the Rules, but they request that this Court break them. Rule 6(5), M.R.App.P. mandates that “[t]he following judgments and orders are among those that are not appealable . . . (b) Orders denying motions for summary judgment or motions to dismiss, or granting partial summary judgment.” The Lokeys’ argument ignores Rule 6(5)(b)’s prohibition in its entirety. Additionally, Lokeys’ claim that forcing them to wait and petition for a writ of supervisory control will cause delay and increased cost is illusory. Besides the fact that it is not a valid reason to break this Court’s Rules, it has been over a year since the District Court

denied Breuner's and Welles' motions for summary judgment and no writ has been filed. Accordingly, Lokeys' argument that breaking the Rules will save time and money, rings hollow.

For the aforementioned reasons, Welles respectfully requests this Court to deny Lokeys' Motion to Reconsider Decision Re: Issues on Appeal.

DATED this 11th day of June, 2010.

MOORE, O'CONNELL & REFLING, P.C.

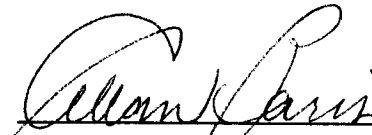
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was served upon the following by mailing a true and correct copy thereof via U.S. mail, postage prepaid, on the 11th day of June, 2010, as follows, to-wit:

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ALLAN H. BARIS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 10.0 is 1,017 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 11th day of June, 2010.

MOORE, O'CONNELL & REFLING, P.C.

BY: 
ALLAN H. BARIS